No. 823

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, APPELLANT

v.

PAUL EVANS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

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OPINION BELOW

The district court rendered no formal opinion. Its order granting the motion to dismiss the indictment discloses the ground of its decision (R. 10). See also R. 9.

JURISDICTION

The order of the district court granting the motion to dismiss the indictment was entered October 10, 1946 (R. 10). The United States filed its notice of appeal to this Court on November 8, 1946 (R. 10-11). Probable jurisdiction was noted by this Court on January 20, 1947 (R. 15). The jurisdiction of this Court to review

the district court's order on direct appeal is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by Section 1 of the Act of May 9, 1942, c. 295, 56 Stat. 271, 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended, 28 U. S. C. 345.

QUESTION PRESENTED

Whether Section 8 of the Immigration Act of 1917, 8 U. S. C. 144, provides a penalty for concealing and harboring aliens not duly admitted by an immigrant inspector or not lawfully entitled to enter or reside within the United States.

STATUTE INVOLVED

Section 8 of the Immigration Act of 1917, c. 29, 39 Stat. 880, 8 U. S. C. 144, provides:

> Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor, or, attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be

deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in.

STATEMENT

In an indictment filed September 4, 1946, in the District Court for the Southern District of California, appellee and one Joe V. Roberts were charged with having violated Section 8 of the Immigration Act of 1917, *supra,* in that on or about June 22, 1946, in Riverside County, California, they concealed and harbored and attempted to conceal and harbor five named alien persons who were not duly admitted to the United States by an immigrant inspector and not lawfully entitled to enter or reside in the United States, as the defendants well knew (R. 1). On October 10, 1946, appellee moved that the indictment be dismissed on the grounds that it did not state facts sufficient to constitute a punishable offense against the United States and that the court was therefore without jurisdiction to impose any punishment against him (R. 2). On the same day, the court (Judge Hall) granted the motion to dismiss "on the grounds that the statute [on which the indictment was based] does not provide a penalty for harboring and

concealing, which is the only thing charged in the indictment" (R. 10).[1]

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that Section 8 of the Immigration Act of 1917, 8 U. S. C. 144, does not provide a penalty for concealing and harboring aliens not duly admitted by an immigrant inspector or not lawfully entitled to enter or reside within the United States.

2. In holding that the indictment did not state a punishable offense.

3. In granting the motion to dismiss the indictment.

SUMMARY OF ARGUMENT

Section 8 of the Immigration Act of 1917 provides, in substance, that any person who brings into or lands in the United States, or attempts to bring into or land in the United States, or conceals or harbors, or attempts to conceal or harbor, or assists or abets another to conceal or harbor, any alien not duly admitted

[1] We have been advised by the United States Attorney that on the following day appellee's codefendant, Roberts, who had previously pleaded guilty (see R. 9), moved in arrest of judgment in view of the dismissal of the indictment as to appellee. The court deferred ruling on the motion, ordering that his case be taken off the calendar, subject to restoration on motion of the United States Attorney, and that he be allowed to remain at liberty on his present bond until notified by the United States Attorney to appear before the court for further proceedings in regard to sentence.

by an immigrant inspector or not lawfully entitled to enter the United States, shall be guilty of a misdeameanor, upon conviction of which he shall be fined not exceeding $2,000 and imprisoned not exceeding five years, *for each and every alien so landed or brought in or attempted to be landed or brought in.* The district court ruled that this section provides no penalty for the concealing and harboring offenses because of the absence of reference to those offenses in the final clause (italicized) of the penal provisions. The court construed this clause as limiting the applicability of the penal provisions to the offenses to which it specifically referred.

This is an unnatural application of the principle of strict construction of penal statutes. *Pickett* v. *United States,* 216 U. S. 456, 461. The manifest intent of Congress is to be given effect in all statutes, penal or non-penal. *United States* v. *Raynor,* 302 U. S. 540, 552. The intent of Congress in Section 8 is clear, as is evidenced by a reading of the statute in the light of its legislative history.

Prior to the Immigration Act of 1917, Section 8 punished only the offenses of landing and bringing aliens illegally into the United States. The section, as it then existed, was found to be insufficient to combat the evil of smuggling aliens into the country since it proscribed only part of this evil. Equally as culpable as landing aliens

is concealing or harboring them once they have entered illegally. To correct this defect, Congress, in the Immigration Act of 1917, amended Section 8 by embodying in it the definition of the offenses of concealing and harboring. No independent penalty was prescribed for them since Section 8 already contained the penalty for the evil of smuggling aliens—an evil which therefore had been incompletely described. Congress intended to have this penalty apply in its entirety to all the offenses it had so carefully defined in the preceding part of the section.

But even if the court's technical, unrealistic reading of Section 8 is followed, a penalty for concealing or harboring aliens is nevertheless contained in Section 8. This penalty is a fine not exceeding $2,000 and imprisonment not exceeding five years. At most, the italicized language does not confer power upon courts to multiply the penalty in the event that more than one alien is concealed or harbored.

ARGUMENT

THE INDICTMENT CHARGES A PUNISHABLE OFFENSE, SINCE SECTION 8 OF THE IMMIGRATION ACT OF 1917 PRESCRIBES A PENALTY FOR CONCEALING AND HARBORING ALIENS

Section 8 of the Immigration Act of 1917 defines, in general, two classes of offenses: (1) landing or bringing in aliens not duly admitted or not lawfully entitled to enter or reside within

the United States, and (2) concealing or harboring aliens who have entered this country illegally. Congress has described both classes of offenses as misdemeanors and has prescribed as punishment a fine not exceeding $2,000 and imprisonment for a term not exceeding five years, "for each and every alien so landed or brought in or attempted to be landed or brought in." The quoted clause does not, as the district court held, confine punishment only to the offense of landing or bringing in aliens. Rather it provides for increased punishment where the crime of landing or bringing in aliens or the crime of concealing or harboring aliens involves more than one alien brought into the country illegally. See *Serentino* v. *United States,* 36 F. 2d 871, 872–873 (C. C. A. 1).

It seems evident that Congress, in Section 8, has prescribed the same penalty for both classes of offenses. To hold that no penalty has been prescribed for concealing and harboring merely by reason of the fact that the quoted clause refers only to landing or bringing in would be carrying the principle of strict construction of penal statutes to absurd and unnatural lengths. This principle does not mean that a statute must be given its "narrowest possible meaning" (*Singer* v. *United States,* 323 U. S. 338, 341–342), nor that a statute must be emasculated. *United States* v. *Giles,* 300 U. S. 41, 49.

However, our contention that a penalty has been prescribed for the offense of concealing or harboring is not based only on the wording of Section 8. The history of the section [2] illustrates clearly that Congress intended the same penalty to apply to the offense of concealing or harboring as applies to that of landing or bringing in aliens illegally.

Section 8, prior to its amendment in 1917, penalized only the crime of landing or bringing in aliens illegally. It read as follows:

> SEC. 8. That any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or who shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment for each and every alien so landed or brought in or attempted to be landed or brought in. (Immigration Act of 1907, c. 1134, 34 Stat. 900).

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[2] In *United States* v. *Raynor*, 302 U. S. 540, this Court examined the history of the counterfeiting statute to determine the meaning of the phrase "similar paper" used in that statute.

It was not long before it was realized that Section 8, as it then existed, was deficient in combatting the evil of smuggling aliens into this country. Equally as culpable as landing or bringing in aliens illegally is the concealing of such aliens after they have entered, since the successful execution of a plan of illegal entry requires not only that an alien land in this country but also that once he is here, he receive assistance in remaining undetected until such time as the "chase" of the immigration officials has ceased. It was for this reason, no doubt, that when the Immigration Act was amended in 1917, Section 8 was expanded to include the crime of concealing or harboring aliens. This is, in part, the explanation given for the amendment of Section 8 in the Senate Report accompanying the Act when it was in bill form.[1] The Report stated:

> SECTION 8. *Description.*—This is based upon section 8 of the existing law, and such new provisions as are included are merely to complete the definition of the crime of smuggling aliens into the United States and related offenses and to meet the various court decisions showing that the present law is not sufficiently explicit.

It is important to note that Congress intended "to complete the definition of the crime of smuggling aliens into the United States" by its addi-

[1] S. Rep. No. 352 on H. R. 10384, 64th Cong., 1st sess.

tion of the offense of concealing or harboring aliens not duly admitted or not lawfully entitled to enter or reside within this country. There was no need to prescribe separately a new penalty for this added offense since the new language merely dealt with an additional and related aspect of the problem of suppressing the smuggling of aliens into this country, the penalty for which had been already fixed in the statute. In effect, the penalty for the newly defined offense was assimilated to that for the previously defined offense of landing or bringing in aliens illegally. That this was Congress' intention is shown by the manner in which it inserted the definition of the new offense bodily in the middle of Section 8. Section 8, as thus amended, reads as follows:

> Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, *or shall conceal or harbor or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle,* any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be

> deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in. [Italics supplied.]

An analysis of Section 8 in the light of the above-quoted amendment reveals that Congress was spelling out more fully the conduct for which persons who assist in some manner in the smuggling of aliens into this country should be punished. Congress added the offense of concealing or harboring in order to strengthen the enforcement of its policy "to exclude from the country all aliens who have unlawfully succeeded in effecting an entry." *Susnjar* v. *United States*, 27 F. 2d 223, 224 (C. C. A. 6).[4] While Congress increased the maximum fine and imprisonment penalties, no change was made in the final clause of the section, viz., "for each and every alien so landed or brought in or attempted to be landed or brought in." Congress may have felt none was necessary since normally there can be no concealing or harboring of an alien until he has been "landed" or "brought in"; or, on the other

[4] This case did not cover the precise point involved herein since the indictment was predicated not on concealing or harboring as a distinct offense but on a conspiracy under Section 37 of the Criminal Code (18 U. S. C. 88) to conceal and harbor aliens in violation of Section 8 of the Immigration Act of 1917. The Sixth Circuit, however, in interpreting the meaning of concealing and harboring in Section 8, had occasion to consider the purposes of the immigration statutes.

hand, the failure to integrate this clause grammatically with the language used in defining the new offense added by the amendment may have been an oversight. In either case, the intention of Congress to fix the same penalty for the offense of concealing or harboring as for that of landing or bringing in aliens is clear.[5]

The only appellate decision on the question here involved is *Medeiros* v. *Keville,* 63 F. 2d 187, certiorari denied, 289 U. S. 746.[6] In that case the Circuit Court of Appeals for the First Circuit squarely rejected the contention, implicit in the decision of the district court in the instant case, that "the last clause of that section [Section

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[5] Quite different, obviously, from the question involved in the instant case is that presented where a legislative body defines and prohibits certain conduct, but utterly fails to prescribe a penalty of any kind for its commission. See *Curry* v. *District of Columbia*, 14 App. D. C. 423, 435–436 (1899); *People* v. *Lunn*, 81 Misc. (N. Y.) 476 (1913); *Haas* v. *Jennings*, 120 Ohio St. 370, 375–376 (1929); *Horak* v. *State*, 95 Tex. Cr. 474 (1923); *Hannabass* v. *Maryland Casualty Co.*, 169 Va. 559, 572 (1938); cf. *Smith* v. *United States*, 145 F. 2d 643, 644–645 (C. C. A. 10), certiorari denied, 323 U. S. 803; *Holmes* v. *United States*, 267 Fed. 529, 531 (C. C. A. 5), certiorari denied, 254 U. S. 640.

[6] In her petition for a writ of certiorari in *Medeiros* v. *Keville*, *supra*, the petitioner urged as error the holding of the Circuit Court of Appeals for the First Circuit that the penalty clause of Section 8 applies to the concealing and harboring provisions of the section (No. 826, O. T. 1932, Pet. 2, 4, 6–9; and see respondent's brief in opposition to the granting of certiorari, pp. 5–9; see also, however, pp. 9–11 of the brief in opposition, urging that the First Circuit's decision was, in any event, correct on other grounds).

8 of the 1917 Act] reading 'for each and every alien so landed or brought in or attempted to be landed or brought in' is a clause of limitation and restricts the broad power of the court previously given as to the imposition of sentence to imposing sentence for offenses consisting in bringing in or landing an alien in the United States or attempting to do so." The court gave its interpretation of Section 8 as follows (p. 189.):

> * * * The last clause of section 8 is not one limiting the power of the court in the imposition of sentence, but one increasing or adding to its power in case the provisions of the section relating to bringing in or landing of aliens in the United States are violated by the bringing or landing of more than one alien at the same time. It has nothing to do with the provisions of the section conferring power on the court to impose sentence in case of concealment or harboring. The section is definite that for such violation the person offending "shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years."[1]

[1] It will be observed that the court indicates that the section does not confer power to make the punishment proportionate to the number of aliens involved where the violation consists of concealing or harboring, as distinguished from the other offenses defined. We think this limitation erroneous. The congressional intent to make the punishment propor-

The only other decisions on the point at issue of which we are aware are all decisions of the District Court for the Southern District of California, the same court from which this appeal has been taken. The judges in that district are divided on the question.[8]

A case strikingly similar to the instant one is *United States* v. *Lacher*, 134 U. S. 624. Lacher, a post office employee, was convicted of embezzling a letter containing an article of value on an indictment under a statute (R. S., sec. 5467) which provided, in pertinent part, as follows:

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tionate where the violation is concealing or harboring is, we think, equally as clear as the intent to make those offenses punishable at all. See discussion, *infra*, pp. 18–19.

[8] The earliest expression of opinion on this question was a *dictum* by Judge Trippett in *United States* v. *Niroku Komai*, 286 Fed. 450, decided in 1923, to the effect that no penalty has been prescribed for concealing or harboring aliens. This *dictum* was followed in *United States* v. *Kinzo Ichiki*, 43 F. 2d 1007, decided in 1930, by Judge Jacobs. More recently the judges in the Southern District of California had, until Judge Hall's decision in the instant case, abandoned the earlier *Kinzo Ichiki* precedent and had held that concealing or harboring is punishable under the statute. *United States* v. *Jack Roberts*, decided by Judge Yankwich on April 29, 1946, *United States* v. *Leon Piamonte* and *United States* v. *Abraham Escarcega Ruiz*, decided by Judge Weinberger on May 21 and 28, 1946, respectively. After Judge Hall's dismissal of the indictment in the present case, Judge McCormick, on October 14, 1946, dismissed a similar indictment in *United States* v. *Leyva-Rodriquez*. Thus, the net result, numerically speaking, in the Southern District of California, has been three decisions holding that concealing or harboring is subject to the penalty prescribed and four decisions (including the *dictum* in *United States* v. *Niroku Komai*, *supra*) holding to the contrary.

> Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him * * * and which shall contain any note, bond. * * * or other pecuniary obligation or security of the Government * * * of any description whatever; * * * any copy of any other record, or any other article of value, or writing representing the same; *any such person who shall steal or take away any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession * * * shall be punishable by imprisonment at hard labor for not less than one year nor more than five years.* [Italics supplied.]

Lacher contended that the indictment could not be sustained since the italicized clause which prescribed the penalty applied only to stealing articles out of a letter and not to embezzlement of a letter, the crime for which he was indicted. This Court, however, rejected Lacher's technical, grammatical arguments. It said (p. 626):

> As secreting, embezzling or destroying letters, etc., containing articles of value, are plainly grave offences, and are described in the section with particularity, the intention to impose a penalty on their commission cannot reasonably be denied, and although the apparent grammatical construction might

> be otherwise, the true meaning, if clearly ascertained, ought to prevail.

And at page 628:

> * * * though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

A more recent case in which this Court had occasion to reject an argument based upon strict grammatical construction is *United States* v. *Gaskin*, 320 U. S. 527. Gaskin was charged with having arrested one Johnson "to a condition of peonage" upon a claim that Johnson was indebted to him, and with intent to cause Johnson to perform labor in satisfaction of the debt. There was no allegation that Johnson rendered any labor or service in consequence of the arrest. The indictment was predicated on Section 269 of the Criminal Code, 18 U. S. C. 444, which provides:

> Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined * * * or imprisoned * * * or both.

The district court sustained a demurrer to the indictment, holding that this section imposes no penalty for an arrest with intent to compel the

performance of labor or service unless the person arrested actually renders labor or service for a master following his arrest. On appeal by the Government, this Court concluded that the district court's interpretation of the section was erroneous. It said:

> The section makes arrest of a person with intent to place him in a state of peonage a separate and independent offense [from actual holding in peonage]. It penalizes "whoever holds, arrests, returns, or causes to be held, arrested, or returned * * * any person to a condition of peonage." The language is inartistic. The appropriate qualifying preposition for the word "holds" is "in." An accurate qualifying phrase for the verb "arrests" would be "to place in or return to" peonage. *But the compactness of phrasing and the lack of strict grammatical construction does not obscure the intent of the Act.* * * * [Italics supplied (pp. 528–529).]
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> * * * * * *
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> The appellee invokes the rule that criminal laws are to be strictly construed and defendants are not to be convicted under statutes too vague to apprise the citizen of the nature of the offense. That principle, however, does not require distortion or nullification of the evident meaning and purpose of the legislation. [pp. 529–530].

We submit, therefore, that a proper reading of Section 8 in the light of its legislative history can

leave no doubt of Congress' intention that the penal provisions should apply to the offense of concealing or harboring an alien not duly admitted or not lawfully entitled to enter or reside within the United States.

However, even if a strictly grammatical construction of Section 8 is employed, it is nevertheless clear that a penalty is provided for concealing or harboring an alien. A literal reading of Section 8 may lead to the conclusion that the same penalty has been prescribed for both landing or bringing in aliens and for concealing or harboring aliens, namely, "a fine not exceeding $2,000 and imprisonment for a term not exceeding five years," but that the last clause, "for each and every alien so landed or brought in or attempted to be landed or brought in," is by reason of its terms limited in its application to the offense of landing or bringing in aliens. In other words, at the very least, the penalties provided are applicable to both classes of offenses, and the last clause merely provides for augmenting the punishment where more than one alien is landed or brought in. Cf. *United States* v. *Union Supply Co.*, 215 U. S. 50, 55. In the *Medeiros* case, *supra*, the First Circuit indicated that this is the proper construction, apparently because of its view that the reference in the last clause to landing and bringing in renders it incapable of being utilized to augment the punishment for

concealing or harboring. We think that this construction, while tenable, is not consistent with the evident intent of Congress, as expressed in the 1917 amendment of Section 8, to have the penal provisions apply in their entirety to concealing and harboring.

CONCLUSION

We therefore respectfully submit that the order of the district court granting the motion to dismiss the indictment should be reversed.

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